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ABSTRACT

This paper stresses that the word "inclusion" is not used in the Individuals with Disabilities Education Act (IDEA) and that the law calls for students with disabilities to be provided with a free, appropriate public education in the least restrictive environment. Ten 1997-1999 court cases that address the placement of students with disabilities are reviewed, including: (1) Kevin G. by Robert G. v. Cranston School Community, a case which demonstrates that the individual needs of the child and where they could best be provided for were given priority over placement in a neighborhood school; (2) Hartman v. Loudon County Board of Education, a case that decided the appropriateness of placement based on academic progress and the nature and degree of severity of the disability; (3) Jonathan G. v. Lower Merion School District, a case in which the court ruled in favor of inclusion in the regular education class because the student was making excellent grades; (4) Mrs. B. v. Milford Board of Education, a case in which the court ruled in favor of a residential program; and (5) Mr. X v. New York State Education Department, a case that reaffirmed that children with disabilities can be placed in segregated facilities. (CR)

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IDEA 1997 - "Inclusion is the Law"

paper presented

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In recent years the term inclusion has become quite popular. It has replaced the term mainstreaming. The term is discussed in special education literature quite extensively but it is difficult to find a definition of the term. In general the term is discussed into two parts which are "full inclusion" and "partial inclusion". According to Hallahan and Kauffman, full inclusion refers to:

1. All students with disabilities– no matter the types or severities of disabilities – attend all classes in general education. In other words there are no separate special education classes.
2. All students with disabilities attend their neighborhood schools (i.e. the ones they would normally go to if they had no disabilities.
3. General education, not special education, assumes primary responsibility for students with disabilities.

The term "partial inclusion" according to Hardman means that, "Students receive most of their instruction in general education settings, but students may be "pulled out" to another instructional setting when it is deemed appropriate to their individual needs." Advocates of inclusion favor elimination of the continuum of educational settings. According to them, the general education teachers have the primary responsibility for all students with disabilities.

Inclusion movement has created quite a controversy among special educators. It has also created a lot of confusion and misinformation. Since the advocates of inclusion favor the elimination of continuum of educational settings one of the misconceptions is that the new law, IDEA 1997, mandates inclusion. Increasingly, I hear from professionals, para professionals, and non professionals alike "inclusion is the law". My intent this morning is to present you with evidence both from IDEA 1997 and its subsequent case law and have you draw your own conclusions.

At this time I want to turn my attention to the preamble of IDEA 1997.
"(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142)__

(A) the special education needs of children with disabilities were not being fully met;
(B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity;
(C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers;
(D) there were many children with disabilities throughout the United States

participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected; and

(E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this Act has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education in improving educational results for children with disabilities.

(4) However, the implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by –

(A) having high expectations for such children and ensuring their **access in the general curriculum to the maximum extent possible;**

(B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) Coordinating this Act with other local, educational service agency, State, and Federal school improvement efforts in order to ensure that such children benefit from such efforts and that **special education can become a service for such children rather than a place where they are sent**;

(D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, **whenever appropriate;**

(E) supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them__

(i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and

(ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible;

(F) providing incentives for whole-school approaches and pre-referral intervention to reduce the need to label children as disabled in order to address their learning needs;" (IDEA, 1997).

I invite you to read these findings carefully. I want to draw your attention, in particular, to # 3 and # 4 above. As I read these findings, the law is saying that prior to 1975 children with disabilities were excluded from public education in one form or the

other. In the last 20 years, they have been granted access but they are still differentiated by low expectations. IDEA 1997 wants to go beyond the point access. The law now wants to hold public education accountable for the quality of education provided to these youngsters. The U. S. Congress has seen that in a majority of states different types of educational reforms are underway. In many states, one component of the educational reform is accountability. The IDEA 1997 wants to ensure that children with disabilities are included in these reform efforts.

The term "inclusion" was neither mentioned in the law in 1990 nor is it mentioned in the law in 1997. What then is the basis for a general perception that inclusion is now the law? I hear it over and over from practitioners as well as administrators both in special and regular education. Is it because IDEA 1997 mandates the inclusion of a regular education teacher on the IEP committee; it requires students with disabilities to participate in the general curriculum and in statewide assessment? If so, I invite you to read (5) (A) and (5)(D) carefully. Provisions (5)(A) ends with "to the maximum extent appropriate" and (5)(D) ends with "whenever appropriate." The law would not put these qualifiers if it mandated full inclusion. Participation in the general curriculum and in statewide assessment are challenges to the teachers. They are intended to ensure quality education to students with disabilities and to hold public education accountable for the education of **all** children.

The word inclusion was not used in The Education for All Handicapped Children Act, PL 94-142. It was not used in IDEA 1990. And it has not been mandated in IDEA 1997. The purpose of PL 94-142 was to provide a free appropriate public education to all children with disabilities in the least restrictive environment. There has not been an iota of change in this mandate. There is no evidence of the elimination of continuum of educational environments in IDEA 1997. The provision of the least restrictive environment (LRE) continues to be a mandate of IDEA 1997.

Now let me review with you the court cases since 1997 I have found on the subject of students' placement.

Case 1.

An 11 year-old Rhode Island student had a respiratory condition that required the use of a tracheal tube for breathing and the presence of a full-time nurse in case of a medical emergency. His parents met with school district representatives to discuss an appropriate IEP. The parties agreed on the IEP but the parents objected to placement at a school which was located three miles away because a nurse was available in that school building. Parents argued that the school should reassign its only full-time nurse from that school to the student's neighborhood school. Parents claimed that attendance at the

neighborhood school would facilitate his development and provide him with an opportunity to form friendships with peers beyond the school day. The parents asserted that the school district's plan was to eventually place the student in a self-contained special education classroom and remove him from regular classes, observing that the neighborhood school did not have a self-contained special education classroom. The parents asked for a due process hearing.

A hearing officer ruled in favor of the school district. An appeals board upheld the decision of the hearing officer.

Parents appealed to the U. S. District Court for the District of Rhode Island. The court rejected parents' claim, "The need to respond to a possible medical emergency overcame the IDEA's presumption in favor of a neighborhood school placement". The parents appealed to the U. S. Court of Appeals, First Circuit, which affirmed the decision of the lower court. (Kevin G. by Robert G. v. Cranston School Comm. (1997).

In this case the individual needs of the child and where they could best be provided for were given priority over the regulation concerning the placement in a neighborhood school.

Case 2

An 11-year old Illinois student with autism was unable to speak and had severe communication problems. He was placed in regular classroom. When the family moved to Virginia he was initially placed in regular classroom. The school district then proposed a self-contained program for academic instruction and speech, with regular education for art, music, physical education and recess. The parents rejected the proposed placement. The school district initiated due process proceedings.

A hearing officer upheld the proposed placement because of student's lack of academic benefits he had received in regular education classes. An appeals board affirmed the hearing officer's decision. The student's parents appealed to the U. S. District Court for the Eastern District of Virginia.

The court reversed the appeals board decision based upon the presumption in favor of mainstreaming under the IDEA.

The school district appealed to the U. S. Court of Appeals, Fourth Circuit, which found that "the District court had disregarded overwhelming evidence that the student made no academic progress in regular classes and that separate, one-on-one instruction was appropriate for him. The IDEA establishes a presumption in favor of

inclusion in regular education classes, but explicitly states that inclusion is inappropriate when the nature of severity of the disability prevents satisfactory progress in regular classes." The court reversed the lower court's decision. (Hartman v. Loudon County Board of Education. 1997)

This is a very clear ruling. The proponents of inclusion strongly argue in favor of social benefits. This ruling does not even elude to social benefits. Instead, it decides the appropriateness of placement based on academic progress and the nature and degree of severity of the disability.

Case 3
A Pennsylvania student with learning disabilities received resource room learning support and attended a mainstream program at his public school. When he entered seventh grade, his school IEP team proposed an educational placement in an inclusive setting with regular education students. The student's parents rejected the proposed placement and requested a due process hearing.

A hearing officer ruled in favor of the school district. An appeals panel affirmed the hearing officer's decision. The parents appealed to the U. S. District Court of the Eastern District of Pennsylvania. The parents asserted that the student required self-contained instruction because he felt uncomfortable with regular education students and needed individualized attention. The court observed that, "the student was receiving excellent grades in his current placement. Because a mainstreaming setting was the least restrictive appropriate environment in which the student could obtain educational benefits, the court affirmed the administrative decisions."
(Jonathan G. v. Lower Merion School Dist., 1997).

Of all the cases I reviewed this is one of the two cases in which the court ruled in favor of inclusion in the regular education class. But notice the standard or the reasoning which the court used..."the student was making excellent grades", in other words, academic progress. This ruling is fully in compliance with LRE.

Case 4
A Connecticut student had serious social and emotional problems including hyperactivity, inability to interact with others and lack of self-confidence. Although she was in the average intelligence range, she failed to progress academically and met only four of 32 objectives stated in her IEP. Upon reevaluation by the school the evaluator recommended placement in a residential facility but the school committee refused the recommendation. The mother succeeded in arranging placement in a residential program through the state Department of Child and Youth Services. The student

attended the residential facility, where her academic and social skills improved. However, the school committee maintained that the placement was non-academic and was made necessary by the student's mother's manipulative behavior.

The mother requested a due process hearing to obtain complete funding for the placement. A hearing officer ruled in favor of the school district. Mother appealed to the U. S. District Court for the District of Connecticut which reversed the hearing officer's decision. The school district appealed to the U. S. Court of Appeals, Second Circuit.

The court observed that, "notwithstanding the non-academic reasons for the residential placement, the student had failed to progress in her public school placement and the school board had failed to take action to remedy her serious academic regression. The residential placement was necessary to enable the student to obtain academic benefits, and it was appropriate for the board to fund the non-educational portion of the residential placement despite the other factors that were present in the decision to place her there. The other factors did not relieve the school district of its obligation to pay for a necessary academic program." The court upheld the lower court's decision. (Mrs. B. v. Milford Board of Education. 1997).

Note for Q. It is noted that the court again ruled in favor of a residential program. Also noted is the reason the court gave for its ruling...the student failed to progress and the school did not take any action to remedy the academic regression. Also is the sanction applied to the school district...it was ordered to fund not just the educational portion of the expense but also the non-educational portion of the residential placement.

Case5
A New York preschool student was identified with autistic symptoms and his parents enrolled him in a home-base program in which he received 40 hours per week of one-on-one instruction using the applied behavioral analysis method. His parents applied to their school district of residence for public preschool educational services. Following an evaluation, the school district recommended placement in a private nursery school for autistic children. The student's father requested a due process hearing asking a less restrictive environment for the child. The hearing officer upheld the school district's recommendation for placement. The decision was upheld by the review panel. The father appealed to the U. S. District Court. The court ruled in favor of the school district... Some students with disabilities must be educated in segregated facilities because of their disruptive behavior or because the gains from inclusive instruction my be marginal. (Mr. X v. New York State Education Dept., 1997)

Once again the court clearly reaffirmed that children with disabilities can be placed in

segregated facilities. Again, this court ruling indicates that the LRE continues to be the mandate of IDEA 1997.

Case 6

An emotionally disturbed Maryland student with severe anxiety disorder, depression, oppositional/defiant disorder and attention deficit hyperactivity disorder received special education services at a public school. However, his grades deteriorated, his behavior problems increased and he occasionally became violent at home. A school placement committee determined that the student should be placed in a therapeutic day school, but his parents requested a due process hearing, asserting that the district had failed to provide him with a free appropriate public education. They unilaterally placed the student in a private Connecticut residential school for severely emotionally disturbed students where he began to make progress.

An administrative law judge held that the school district had committed serious IDEA procedural violations that deprived the student of a free appropriate public education. The judge also determined that the private facility was appropriate and that the parents were entitled to reimbursement for the costs of the placement.

The school board appealed to a federal district court, where it challenged the administrative decision. The parents requested a preliminary order requiring the school district to fund the student's private residential placement under the IDEA stay put provision. The court noted that the stay put provision requires the maintenance of a student's placement during the pendency of any IDEA proceeding unless the parents and educational agency otherwise agree. An administrative ruling that affirms the appropriateness of a unilateral parental placement constitutes an agreement by the state to the change of placement under the stay put provision. Therefore, the school district was required to fund the residential placement pending further proceedings.
(Board of Education of Montgomery County v. Brett Y., D. Md. 1997).

This case is slightly different in nature. It involves invoking the stay put provision of the law. However, the ruling, in favor of a residential facility, once again shows the affirmation of the least restrictive environment.

Case7

A Massachusetts student with Schizotypical personality disorder attended public school from kindergarten through grade eight. During seventh grade, his parents obtained an independent evaluation, stating that he required placement with peers who were not overly aggressive. They considered placing him in a parochial school because of lower student-teacher ration and supportive environment. The public school refused to consider

the placement. The parents unilaterally placed him in a private school.

The parents initiated a due process hearing for tuition reimbursement. The hearing officer determined that reimbursement was prohibited by the state and federal constitutions due to the school's sectarian nature.

The parents appealed to the U. S. District Court of Massachusetts. The court found that the placement was reasonably calculated to enable the student to receive educational benefits and that the school had failed to provide him with an appropriate placement. The request for reimbursement did not violate the U. S. Constitution or the Anti-Aid Amendment to the Massachusetts Constitution because payment went directly to the parents and had no purpose or effect of founding, maintaining or aiding the parochial school. Matthew J. v. Massachusetts Dept of Education, 1998).

Case 8

An Ohio student with learning disabilities was placed in a transitional learning center after being tested for a severe behavior disability. His behavior and academic performance improved and his parents authorized his entry into a program for students with severe behavior disabilities for grade nine. However, he was suspended and sent to a detention home for coming to school with a gun. Later, he was hospitalized for behavior problems. The parents removed him from the school system and placed him in a residential program. The parents sought reimbursement of $71,000 which was denied by a hearing officer. A review panel reversed the decision of the hearing officer. The school district appealed to a federal district court. The court observed that school systems are required to formulate IEPs that are reasonably calculated to confer some educational benefit upon a student. The IEP prepared by the school district in this case adequately addressed each of the elements of an appropriate IEP. The court ruled in favor of the school district. (Bd. Of Education of Avon Lake City School Dist. V. Patrick M., by and Through Lloyd M. (1998).

In this ruling, once again, the court once again applied the standard of appropriateness of the IEP.

Case 9

A Pennsylvania student had been identified as other health impaired in fourth grade and received modifications in his regular classes including oral test taking and remedial instruction. The student's father died at the start of his seventh grade year which severely affected his emotional behavior and resulted in inpatient treatment. When the student became aggressive and assaultive at home, his mother unsuccessfully attempted to

implement a home study program, then unilaterally enrolled him in a residential facility. She requested a reevaluation which was done. Based on the reevaluation the school district prepared a new IEP which did not call for a residential placement. The student's mother filed an administrative complaint against the district.

A hearing officer ruled in favor of the school district. Hearing officer's decision was reversed by the administrative appeals panel. The panel ordered the district to pay his tuition for the residential facility for the entire year.

On appeal before the commonwealth court, the school district asserted that it could provide an appropriate education for the student in its own facilities and that the unilateral action of the parent barred her claim for reimbursement. It observed that other courts have rejected tuition reimbursement claims when a student is progressing educationally but demonstrates behavior problems at home.
The court stated that, "the student had not progressed in his public school program and that the IEPs proposed by the district failed to meet his academic, emotional and social needs. Since each of these requirements were appropriate consideration for an IEP, the appeals panel had correctly held that the district did not offer the student an IEP that was reasonably calculated to provide him with educational and social benefits. The court affirmed the appeals panel's decision. (Stroudsburg Area School Dist. V. Jared M., 1998).

On a continuum of educational alternatives a residential placement is one of the most restrictive environments. This is a setting which is as far removed from inclusion as it can be. And the court ruled in favor of this very restrictive environemnt.
Another important factor to which we need to pay attention is the location of the serious behavior problems of this youngster...at home... the argument often used by school districts. The court did not buy the argument.
Last but not least, it is important to again see the standard applied by the court...the IEP developed by the school district failed to meet his academic, emotional, and social needs.

Case 10
A student with a significant sexual disorder was placed in a segregated program at a high school. He improperly touched a classmate and his IEP was amended to require his supervision by an adult at all times. The following year he was hospitalized for treatment of ongoing pedophilia. His adoptive parents initiated child protection proceedings due to their inability to supervise him and he was committed to the custody of the state department of social services. Without notifying the school district, DSS placed him in a residential school for the mentally disabled students with sexually offending behaviors. The school district proposed resuming the district placement. A hearing officer

determined that the IEP proposed by the school district was inappropriate because it failed to address the student's sexual behavior. The school district appealed to a federal district court.

The court held that given the students unique needs, special education for him included counseling and therapy that was available at the residential school, but not in district schools. The court upheld the hearing officer's decision.
Upon appeal the U. S. Court of Appeals held that a student was entitled to a residential placement to receive comprehensive behavior therapy for his sexual misbehavior. The court affirmed the administrative decision. (Mohawk Trail Regional School Dist. V. Shaun D. by Linda D. (Mass. 1999).

Once again, there is evidence of placement in a more restrictive environment because of the individual needs of the student.

In each of the above cases the courts have ruled on the basis of educational, social, and emotional needs of the individual students and the appropriateness of the IEPs rather than on the basis of inclusion. The courts have indeed ruled more often in favor of a more restrictive environment as opposed to inclusion.

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